INDEX.

PAGE

I. The Act is inapplicable because work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the Act 3

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the Union making the steady night shift inspection jobs available to women without reducing any employee's wage rate..... 13

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded 18

IV. Conclusion 21

CITATIONS.

Cases:

Armstrong Paint & Varnish Works v. Nu-Enamel Corp., 305 U.S. 315 (1938) 5

Griggs v. Duke Power Co., 401 U.S. 424 (1971)..... 19

Hagger Co. v. Helvering, 308 U.S. 389 (1940)..... 5

Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970) 11

Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972) 11, 12

Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971) 19

PAGE

United States v. American Trucking Ass'ns, Inc., 310 U.S. 534 (1940) 5
United States v. Bethlehem Steel Co., 446 F.2d 652 (2nd Cir. 1971) 19
United States v. Katz, 271 U.S. 354 (1926) 5
Wirtz v. Basic Inc., 256 F.Supp. 786 (D.C. Nev. 1966) .11, 12

Statutes:

Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) .. 2, 3, 6, 13, 14, 18, 20
Fair Labor Standards Act of 1938 2
Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* 2, 11, 18

Miscellaneous:

109 CONG. REC. 8697 8
9195 2
9196 2
9197 ..... 2, 10
9198 (House, May 23, 1963) 2, 11

H.R. 3861, 88th Cong., 1st Sess. (1963) 15, 16, 17
H.R. 6060, 88th Cong., 1st Sess. (1963) 15, 17
Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor, 88th Cong., 1st Sess. (1963) .. 16

29 C.F.R. §§ 800.125-800.131 (1973) 8
§ 800.131 (1973) 8
§ 800.132 (1973) 8
§§ 800.2-800.3 (1973) 8

IN THE

Supreme Court of the United States

October Term, 1973

No. 73-29
and
No. 73-695

CORNING GLASS WORKS,
Petitioner in No. 73-29,

v.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Respondent in No. 73-29.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

PETER J. BRENNAN, Secretary of Labor,
United States Department of Labor,
Petitioner in No. 73-695,

v.

CORNING GLASS WORKS,
Respondent in No. 73-695.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

REPLY BRIEF FOR CORNING GLASS WORKS

Because of the very severe time strictures placed upon preparation of this Reply Brief, we will be able to deal

with only the most serious errors in the Brief for the Secretary of Labor (hereinafter the "Secretary") to be filed by the Solicitor General of the United States.[1]

As a preface to any analysis of the Secretary's Brief, it is important to keep in mind that we are engaged in a case construing the meaning and application of the Equal Pay Act of 1963. 29 U.S.C. § 206(d)(1). We are not engaged in a case involving application of Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e, *et seq.* As appears on its face, the Equal Pay Act, unlike Title VII, is not a statute containing general prohibitions against sex discrimination in all terms and conditions of employment. The Equal Pay Act was intended by Congress, and drafted by Congress, to be a statute of limited application.[2] The Equal Pay Act is an amendment to the Fair Labor Standards Act of 1938. Like the minimum wage and overtime provisions in the Fair Labor Standards Act, the Equal Pay Act was intended to have a clear meaning to employers.[3]

---

[1] The Brief to which we are replying has not yet been served upon us in a final form. The Brief on behalf of the Secretary of Labor (hereinafter the "Secretary's Brief") was due on March 4, 1974. On March 14, 1974, we received a tentative draft of that Brief which was partially handwritten and partially typewritten. The argument in this case has been scheduled for March 25, 1974, and we have been advised by the Clerk of this Court that our Reply Brief must be filed no later than March 22, 1974. The citations in this Reply Brief are to a page proof copy of the Secretary's Brief which we have just received and which we are advised has been distributed to the Court. Accordingly, the citations in this Brief may be at variance from the pages which will ultimately appear in the Secretary's final printed Brief.

[2] 109 CONG. REC. 9195-96 (House, May 23, 1963) statement by Congressman Frelinghuysen. 109 CONG. REC. 9197-98 (House, May 23, 1963) statements by (in sequence) Congressmen Goodell, Griffin, Thompson. Supreme Court Brief of Corning Glass Works at Add. I, B-26-28 (hereinafter "Corning's Brief") (citations to "Add. ____" refer to Addenda to Corning's Brief).

[3] *Id.*

The Act was not intended to be interpreted or enforced merely wherever sex discrimination in employment might be alleged or even found to exist.[4]

The Equal Pay Act (hereinafter "the Act") should not be applied unless the explicit prerequisites to its application exist.[5]

I. The Act is inapplicable because work on a steady night shift is performed under a different "working condition" than work during the day within the meaning of the Act.

Corning Glass Works (hereinafter "Corning") argues, at 20-38 of its Brief, that work on a steady night shift is not performed under a similar working condition as work during the day within the meaning of the Equal Pay Act and that the Act has no application to the facts involved in these cases.

In regard to this issue the Second Circuit Court of Appeals concluded that work on a steady night shift was under a similar working condition as work during the day

---

[4] *Id.*

[5] The Equal Pay Act provides, in pertinent part, that:

"(d) (1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . . ." Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1).

within the meaning of the Act.[6] We have analyzed what we believe to be the error of that conclusion to the best of our ability in Corning's Brief at 20-38, and we respectfully refer the Court to that discussion. The Third Circuit Court of Appeals concluded that work on a steady night shift is not a similar working condition.[7]

Both circuit courts explicitly concluded that the Act is inapplicable if work on a steady night shift is a different "working condition" than day work.[8]

The Secretary has raised two arguments in this regard which require further response.

First, the Secretary has expanded upon the Second Circuit's suggestion[9] that the term "similar working conditions" as used in the Act was used in a "technical" sense rather than in the ordinary usage of the words.

The Secretary now claims that "working conditions" as used in the Act means only "physical surroundings" and "hazards"[10] and does not include work on a steady night shift.

We believe that the legislative history will not support the view that Congress intended such a distinction and we have fully discussed the legislative history in Corning's Brief at 20-32. The Secretary's reliance upon testimony of job evaluation experts (who did not discuss the "night-day"

[6] App. (2d Cir.) 203. The abbreviation "App. (2d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-29. The abbreviation "App. (3d Cir.)" is used herein to refer to the printed Appendix, filed pursuant to Supreme Court Rule 36, regarding case No. 73-695.

[7] App. (3d Cir.) 207.

[8] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207.

[9] App. (2d Cir.) 202-03.

[10] Secretary's Brief at 25-32.

question) before the House of Representatives Committee on Education and Labor[11] is misplaced and we have discussed this in Corning's Brief at 29-30 and n.53.[12]

The Secretary's suggestion that work during hours when human beings sleep is under a similar "physical surrounding" as work during hours when human beings are ordinarily awake is absurd.

Certainly, it is contrary to all of the authorities which we have found in medicine, sociology, labor and management and to the statements of Congressmen who promoted the Act. We discuss the findings and conclusions of these authorities at 32-38 of Corning's Brief.

In concluding its argument on this general issue, the Secretary's Brief cited, at 35, four cases[13] decided by this Court which hold, *inter alia*, that a statute should not be read literally if to do so would produce an absurd result. It would seem much more appropriate that the principle applicable to the instant cases should be that a statute should be read as it is written where failure to do so would produce an absurd result.

---

[11] Secretary's Brief at 31.

[12] The Government also pointed to testimony by the late Dr. Paul Lehoczky (Secretary's Brief at 32) that work on a steady night shift was a "wage condition" and from that argues that it cannot be a "working condition" within the meaning of the Act. This characterization of Dr. Lehoczky's testimony is inaccurate because it is incomplete. Dr. Lehoczky went on to explain that work on a steady night shift is also a working condition but that it is not reflected in job evaluation systems. App. (3d Cir.) 97. We respectfully refer the Court to Corning's Brief at 30 n.53 for an explanation of the probable reasons for the existence of this distinction.

[13] *United States v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 543 (1940); *Hagger Co. v. Helvering*, 308 U.S. 389, 394 (1940); *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938); *United States v. Katz*, 271 U.S. 354, 357 (1926).

The second argument raised by the Secretary's Brief, at 32-35, is the proposition that, even if work on a steady night shift is a similar working condition to work during the day, the Act nevertheless applies to these cases because the union contracts provided shift differentials which paid employees a designated amount for such work.

We are surprised that the Secretary has adopted such an opportunistic, result oriented, view of this case and that it now seeks to advance this proposition which it did not urge upon either the Second or Third Circuit Courts of Appeal (and which it implicitly rejected in the Second Circuit) and which is in disagreement with the Secretary's official administrative statements directly covering the matter.

The district court in the New York case found that work on a steady night shift was not under a similar working condition as day work. However, it concluded that the contract shift differential "adequately compensates employees for working undesirable times of day."[14]

The Secretary, in briefing and arguing Corning's appeal to the Second Circuit, in which the threshold issue on appeal was the district court's decision on this question, did not urge the adoption of the district court's decision. Instead, the Secretary implicitly rejected the district court's reasoning and argued that working conditions were similar.[15] The Secretary did not argue, in the alternative, that the district court's view on this issue should be adopted.

Apparently, however, the Secretary has now concluded that winning these cases is more important than the sensible and consistent application of the Equal Pay Act.

---

[14] App. (2d Cir.) 162.

[15] Brief for Appellee (2d Cir.) at 21-28.

We are convinced that our indictment of the Secretary's approach to this issue is not an overreaction. Not only is the Secretary's proposition, here advanced, squarely contrary to the Secretary's own regulations, but it will destroy the statute as it has been known and applied since 1963.

The proposition advanced by the Secretary is that working conditions which are not similar can be compared under the Act by isolating the condition which is dissimilar and finding that condition to have been "adequately" compensated. This constitutes a gross misapplication of the Act and expands the role of district courts applying the Act far beyond that intended by Congress as reflected by the language of the Act, the legislative history, and the Secretary's published regulations, and far beyond the scope of any appellate court decision. If the Secretary is correct in its understanding of the Act, it will mean that it would be possible to find a violation of the Act even though the skill, effort, responsibility or working conditions are not "equal" or "similar" simply by concluding that the difference in the work is not commensurate with the difference in pay. It would make the district court the arbiter of whether a wage rate is fair, require the court to establish a fair rate and force the court to oversee wage bargains struck by labor and management.

Such an application is clearly not within the purpose of the Act.

The language of the Act, the legislative history and the Administrator's regulations make it plain that the Act has no application where the working conditions are not similar. Both of the Circuit Courts below so held.[16]

---

[16] App. (2d Cir.) 201-02; App. (3d Cir.) 201, 207.

The Secretary's regulations[17] make it clear that the Act does not apply to jobs which are not performed under similar conditions. Regulation 29 C.F.R. § 800.131 provides that:

> "In order for the equal pay standard to apply, the jobs must be performed under similar working conditions."

Similarly, Regulation 29 C.F.R. § 800.132 states that:

> "Generally, employees performing jobs requiring equal skill, effort, and responsibility are likely to be performing them under similar working conditions. However, in situations where some employees performing work meeting these standards have working conditions substantially different from those required for the performance of other jobs the equal pay principle would not apply."

This is the Secretary's language—his interpretation—and he is bound by it.[18] Really it is the only reasonable interpretation which could be drawn from the clear language of the Act.

It is indeed curious that the Secretary fails to discuss his own above-cited regulations which bear directly upon this question.

Instead, the Secretary has attempted to divert this Court from the Secretary's own regulations and the questions of law presented by these cases through an extended recitation of evidence which the Secretary claims indicates a discrim-

---

[17] 29 C.F.R. §§ 800.125-800.131 (1973).

[18] The Secretary's Regulations state that they indicate the construction of the law which the Secretary of Labor believes to be correct and that employers may rely upon them. 29 C.F.R. §§ 800.2-800.3. The latter was confirmed by Congressman Goodell in the House debates. 109 CONG. REC. 8697 (House, May 23, 1963).

inatory intent by Corning.[19] Not only is an employer's alleged discriminatory intent irrelevant under the Act where the working conditions (or the effort, skill or responsibility) are not equal, but the record is by no means clear on the question of Corning's intent in 1925-30 when the rate differential was created. The facts are that Corning has always paid everyone who worked the steady night shift inspection jobs the higher steady night shift base rate and has never paid this rate to persons working during the day.[20] The district court in the New York case found as a fact that women who performed the same job as male inspectors on the steady night shift during World War II were paid the higher steady night shift base rate as well as the applicable shift differential.[21] Thus, on the only occasion when the variable of sex was eliminated from the comparison jobs (while the night-day difference remained) the higher steady night shift base rate continued to be paid to both men and women night shift inspectors.

The truth of the matter is that no one can now say with any degree of certainty *why* Corning paid a higher base rate for steady night shift inspection work in 1925-30. It is, however, a fact that it was only paid for work steadily

---

[19] The Secretary's Brief devotes pp. 7-14, 18 and 22 to a discussion of the underlying evidence which it felt proved Corning's intent to discriminate against women, including a prolonged discussion of the archaic SJ&H Job Evaluation Plan, which the New York district court found to be lacking in probative value under the Equal Pay Act because the Plan failed to take physical effort, among other things, into account in measuring the worth of jobs. App. (2d Cir.) 157.

[20] App. (2d Cir.) 150-51, 154; App. (3d Cir.) 176, 177.

[21] App. (2d Cir.) 150-51. Since no one could remember how employees were paid at the Wellsboro plant during World War II, the Pennsylvania district court made no direct finding on this point. App. (3d Cir.) 183.

at night and to all inspectors who worked steadily at night.[22]

Further, the legislative history, as well as the Secretary's Regulations, establish the proposition that the Act is just not applicable if working conditions are not similar.

Congressman Goodell, in the House debates, stated that:

> "We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 CONG. REC. 9197 (House, May 23, 1963); Corning's Brief at Add. B, B-27.

---

[22] The Secretary (and the Second Circuit as well) points to speculation by the Corning Manager of Statistics and Surveys that one of the reasons the higher steady night shift rate was paid in 1925-30 was to induce men to agree to perform what they felt was demeaning, female work. (Secretary's Brief at 8-9, 22). Of course, none of the persons who were deposed or who testified at trial in the New York case was employed by Corning during the 1925-30 period. Any comment on this subject was purely speculation and should have been entitled to little probative value. It should be noted that the witness whose testimony was relied upon also speculated that the higher rate was paid in 1925 because the men moving to these jobs had lost the opportunity to work on incentive-paid jobs and also lost overtime opportunities which they may have enjoyed on the jobs which they had previously worked. He also mentioned "disagreeable hours" as another reason for payment of the rates. App. (2d Cir.) 120. The Secretary's Brief, at 22, implies that the presence of a plant-wide union contract shift differential somehow nullifies the possibility that the higher base wage rate was related to the fact that the work was done at night. However, it must be remembered that the higher base wage rate arose in 1925-30, before the advent of a union at either Corning plant, and before the creation of a plant-wide shift differential. App. (2d Cir.) 150-51; App. (3d Cir.) 183-84.

Congressman Goodell also stated:

> "In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employers and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it." 109 CONG. REC. 9198 (House, May 23, 1963); Corning's Brief at Add. B, B-29-30.

Thus, as Congressman Goodell pointed out, the language of the Act was changed from that which had been unsuccessfully proposed the prior year to include a specific reference to skill, effort, responsibility and working conditions with the specific intent that the Act should apply to jobs only where each of these elements were equal or similar, as the case may be. Where these elements are not equal or working conditions not similar the wage rate is left to the free process of collective bargaining, subject, of course, to supervision under Title VII of the Civil Rights Act which, in broad language, prohibits discrimination in employment.[23]

The Secretary's Brief, at 33-34, cites three cases [24] which it suggests support the view of the Act which the Secretary has now adopted in his Brief.

In *Hodgson v. Brookhaven*, 436 F.2d 719 (5th Cir. 1970), the Fifth Circuit reversed and remanded the matter to the district court because that court's fact findings were insufficient to support its conclusion that the jobs being compared involved equal skill, effort and responsibility. The footnote (436 F.2d 723 n.3) quoted by the Secretary in its

---

[23] Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e.

[24] *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970); *Hodgson v. Miller Brewing Co.*, 457 F.2d 221 (7th Cir. 1972); *Wirtz v. Basic Inc.*, 256 F.Supp. 786 (D.C. Nev. 1966).

Brief, at 33-34, merely pointed out that although the evidence suggested that working conditions in one section of the hospital were more unpleasant than at another section, employees were not paid differently when working in the more disagreeable section. Thus, the Fifth Circuit commented that this unpleasantness could not account for the pay differential.

In sharp contrast, in the instant cases, all persons who have worked the disagreeable steady night shift jobs in dispute received a higher base rate than persons who worked on the comparison jobs during the day.

The cases of *Hodgson v. Miller Brewing,* 457 F.2d 221 (7th Cir. 1972), and *Wirtz v. Basic Inc.,* 256 F.Supp. 786 (D.C. Nev. 1966), both involved situations in which men worked during the day shifts as well as at night while women worked only during the day. Nevertheless, the men were paid a higher base rate when working on the same job as the women during the day. Thus, the courts found violations comparing the jobs as performed during the day. A night-day comparison was not involved.

The language of the Act, the legislative history, and the Administrator's Regulations make it plain that the Act has no application where "working conditions" are not similar on the jobs being compared.

The plain meaning of the words of the Act, as defined by ordinary usage and also as defined by authorities in medicine, sociology, labor, management, and by the statements of the Congressman (Goodell) who was most active in promoting the passage of the Act, is that work on a steady night shift is not a similar "working condition" compared with work during the day.

On the basis of the facts and reasons set forth herein and in Corning's Brief, we respectfully request that this Court conclude that work on a steady night shift is not performed under a similar working condition as work during the day and that the Equal Pay Act is inapplicable.

II. Even if a prior violation of the Act had occurred, Corning was in compliance with the Act subsequent to June 1, 1966, when it negotiated an agreement with the Union making the steady night shift inspection jobs available to women without reducing any employee's wage rate.

The Secretary's argument, with respect to Question II of the Questions Presented, that Corning failed to adhere to the Act when it gave all women inspectors an opportunity to work on night shift inspection jobs in June, 1966, fails to apply the statute to the facts and is based upon a misunderstanding of the legislative history.

It is not disputed that on June 1, 1966, the steady night inspection jobs at the Corning, New York, plants[25] were made available to women[26] and that, by June 20, 1966, all of the women then working on the day shift jobs had an opportunity to accept work on these jobs.[27]

Thus, after June 1, 1966, both men and women worked the steady night shift inspection jobs and received the higher steady night shift rate of pay. It is clear that there was no residual discrimination on the basis of sex because

---

[25] The Third Circuit held that the Act was not applicable because it held that work performed on the steady night shift is not performed under similar working conditions to work performed during the day. Accordingly, it did not reach Questions II and III which are presented for this Court's review and only the fact findings and conclusions of law in the Second Circuit case are relevant to these questions.

[26] Corning's Brief at 9-11, 38.

[27] Corning's Brief at 39 n.63b.

all of the women who had worked as day shift inspectors in the Corning establishments involved in that case had the opportunity to accept work on the steady night shift jobs.

The sole basis upon which the Second Circuit Court of Appeals concluded that the violation of the Act continued after June 1, 1966, was the meaning which that court attributed to the "reduction proviso" of the Act, which states:

> "[A]n employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1).

The Second Circuit, relying upon the legislative history, held that the "reduction proviso" meant that the employer must increase the rate of the lower rated job.[28]

Corning argues in its Brief, at 41-46, that the words "shall not reduce" are not ambiguous and that resort to legislative history is improper absent a determination that an ambiguity exists and, further, that an interpretation of the words "shall not reduce" to mean "shall increase the rates of the lower rated jobs" is not even a credible definition of the statutory language.

The Secretary's Brief, at 38, dismisses, as a mere "semantic argument," our contention that the statutory language "shall not reduce" should not be read to mean "shall increase." The Secretary concedes that Corning did not "reduce" wage rates[29] but claims that "we need not reach the issue of whether Corning has complied with the no-reduction *proviso;* it did not comply with the core requirement of equal pay for equal work."[30]

---

[28] App. (2d Cir.) 210.

[29] Secretary's Brief at 38.

[30] *Id.*

This is the first time that the Secretary has suggested, in any court in this case, that a violation could be found after June 1, 1966, by applying the Act to the facts without resort to the reduction proviso.

We do not believe that this view can withstand close scrutiny. Certainly, the implications of this interpretation upon the application of the Act are profound. If correct, it would mean that the "core requirement of equal pay for equal work"[31] requires that comparison jobs be paid the same even though both sexes are working on both jobs (the situation that existed in the Second Circuit case after June 1, 1966).[32] Clearly the language of the Act does not support this interpretation.

The Second Circuit held that Corning continued to violate the Act after June 1, 1966, solely on the ground that the legislative history indicated that the "reduction proviso" of the Act required an increase in the wage rate of the lower rated job.

As we point out in Corning's Brief, at 41-46, in examining the legislative history, the Second Circuit relied solely upon discussions which occurred in the Congress during hearings on H.R. 3861, a bill which did not become law and which contained an explicit requirement that the wage rate of the lower rated job be raised to that of the higher rated job. This requirement was not included in H.R. 6060, which eventually became law and which provided that an employer shall not reduce wage rates to obtain compliance.

The Secretary's statement that H.R. 3861 was not "more explicit" than H.R. 6060 in requiring that wage rates be raised is inaccurate.

---

[31] *Id.*

[32] Corning's Brief at 38-39.

H.R. 3861 provided as follows:

> "*Provided,* That an employer who, on the date of this enactment, is paying a wage rate differential which would be in violation of the Act on its effective date may *adjust the lower wage rate* as follows:
>
> "(1) On the effective date of this Act, all wage rate differentials shall be reduced by an amount equal to 10 per centum of the higher wage rate in effect on the date of enactment;
>
> "(2) One year from the effective date of this Act, remaining wage rate differentials shall be reduced by an amount equal to 15 per centum of the higher wage rate in effect on the date of enactment;
>
> "(3) Two years from the effective date of this Act any remaining wage rate differential shall be removed." [Emphasis supplied.] (Reprinted at Add. C of Corning's initial Brief; the quoted portion is found at C-5.)

This explicitly states that the wage rate of the lower job must be increased to the rate of the higher rated job over a two-year period.[33]

Furthermore, the House hearings made it clear that both Congressmen and the Secretary were dissatisfied with H.R. 3861 because they thought it would require the lower rate to be raised to the level of the higher.[34]

---

[33] In addition, the Secretary implies that the possibility that compliance would be achieved by reducing the higher rate "was sharply criticized later in the hearings." These comments, however, did not come from a Congressman or the Secretary who would have realized that Section 4 of H.R. 3861 mandated an increase in the lower rate. Instead, they were the remarks of an AFL-CIO official who, perhaps, was not completely familiar with H.R. 3861. The referenced remarks appear in the statement of James B. Carey, Secretary-Treasurer, Industrial Union Dep't, AFL-CIO, and President, IUE, AFL-CIO. *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor,* 88th Cong., 1st Sess. 108-20 (1963).

[34] Corning's Brief at 41-43; *Hearings on H.R. 3861 and Related Bills Before the Special Subcommittee on Labor of the Committee on Education and Labor,* 88th Cong. 1st Sess. 64-65 (1963); Corning's Brief, Add. A, A-6-8.

It was in this context that H.R. 6060 and the statute as enacted removed the mandate that the lower rate be increased which was contained in H.R. 3861 and provided instead that the higher rated job could not be reduced in order to achieve compliance.

The Secretary is seeking to obtain an interpretation of the statutory language of the "reduction proviso" which would impose a more harsh remedy upon an employer than that provided by H.R. 3861 which explicitly mandated an increase in the lower rated job over a period of time.

We have fully dealt with the legislative history relevant to this issue in Corning's Brief at 41-46 and we respectfully refer the Court to that discussion.

The Secretary's Brief, at 39 n.21, suggests that Corning violated the "reduction proviso" because seven men who had worked as steady night shift inspectors accepted inspection jobs performed during the day. The fact that men exercised their seniority to claim day shift work at the lower day shift rate does not indicate that Corning reduced the rate of jobs in violation of the reduction proviso. The action that Corning took was to open the inspection jobs to both men and women. No employee's wage rate was reduced by Corning.[35]

[35] It should be noted that the Secretary's reference, in its Statement of Facts (Secretary's Brief at 13 n.10), to women remaining on steady night shift inspection jobs for short periods of time was limited to the Wellsboro, Pennsylvania, plant (Third Circuit case) which is not involved in this issue. The same limitation is applicable to the Secretary's reference (Secretary's Brief at 13) to an "84 day rule" which it implies may inhibit women from accepting steady night shift work because of a desire to avoid "dismissal" in the event of a reduction in force. This statement is inaccurate, even as applied to the Pennsylvania plant, because the women would not be "dismissed." They would merely exercise their seniority to return to day shift jobs.

Finally, the Secretary has erected a strawman in its suggestion that we urge that rights accruing under the Equal Pay Act can be waived in collective bargaining.

Our contention is that Congress intended to afford a maximum flexibility to free collective bargaining in adjusting rate relationships. In this case the adjustment agreed upon was to open the inspection jobs on the steady night shift to women without reducing any employee's wage rate. Our views concerning the importance of maintaining this freedom are set forth in Corning's Brief at 48-49.

For the reasons set forth above and in Corning's Brief at 38-50, we respectfully request that the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since June 1, 1966.

III. The equal pay provisions of the Fair Labor Standards Act do not prohibit an employer from correcting a prior violation by establishing a fair and non-discriminatory wage rate for the comparison jobs and protecting all persons then employed, regardless of sex, to an even higher wage rate when employed on the comparison jobs (here the steady night shift) from which women previously had been excluded.

We adequately anticipated the Secretary's arguments in respect to this issue in our main brief, except the Secretary's reliance upon three Title VII cases in support of its contention that the protection of all persons employed by Corning on January 20, 1969, to a higher rate when working on steady night shift inspection jobs perpetuates discrimination.[36]

---

[36] Secretary's Brief at 44.

Each of these cases turns upon principles which are not involved in this case.

In *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the employer had discriminatorily excluded blacks from working in certain jobs on the basis of their race. Subsequently, the employer had eliminated the blatant racial barrier and substituted testing and educational requirements which the court found to be unrelated to performance of the work and which effectively excluded blacks from the jobs. Thus, the Court struck down the discriminatory job requirements.

In both *United States v. Bethlehem Steel Co.*, 446 F.2d 652 (2nd Cir. 1971) and *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. dismissed* 404 U.S. 1006 (1971), the district courts had found that the employer had assigned blacks to undesirable jobs on the basis of their race and that the seniority provisions of the collective bargaining agreement discouraged black employees from exercising transfer rights to more desirable jobs because they were compelled to accept a lower rate and loss of accrued departmental seniority. Thus, the courts ruled that the black employees should be protected through special provisions for rate retention and seniority carryover on transfer from the undesirable jobs.

Compare those cases with the instant case.

The steady night shift jobs had been completely integrated long prior to January, 1969. All women working as day shift inspectors had the opportunity to take steady night shift inspection jobs as early as June 20, 1966.[37]

The 1969 collective bargaining agreement established a single "job evaluated" rate for each of the disputed jobs

[37] Corning's Brief at 38.

which was found to be a fair, non-discriminatory rate, "not based on sex."[38]

All persons employed on the date of the agreement at any jobs in the plant were protected to a higher "red circle" rate in the event that they should accept employment on a steady night shift inspection job.[39]

We have fully discussed our analysis of the effect of this agreement under the Equal Pay Act in Corning's Brief at 50-53. We believe that it is clear that these facts are distinguishable from those of the cases discussed above.

For the reasons set forth above and in Corning's Brief at 50-53, the decision of the Second Circuit on this question should be reversed and this Court should determine that Corning has been in compliance with the Act since January 20, 1969.

---

[38] App. (2d Cir.) 183.

[39] App. (2d Cir.) 183-84; Corning's Brief at 50-51.

IV. Conclusion

For the reasons stated in this Reply Brief as well as the reasons stated in Corning's Brief, we respectfully request that this Court follow the principles extensively set forth in the Conclusion of Corning's Brief at 54-55.

Respectfully submitted,

SCOTT F. ZIMMERMAN,
WALTER P. DEFOREST III,
EDWARD N. STONER II,

REED SMITH SHAW & McCLAY,
747 Union Trust Building,
Pittsburgh, Pennsylvania 15219,

Counsel for Corning Glass Works,
Petitioner in No. 73-29
and
Respondent in No. 73-695.

March 19, 1974.